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IN THE

Supreme Court of the United States

October Term, 1949.

No. 743.

UNITED STATES OF AMERICA,
Petitioner,

v.

HARRY S. KNIGHT,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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I. The Petition sets forth no extraordinary reason for reviewing the non-final judgment of the Court of Appeals.

Respondent was granted a new trial because the jury had been misled by the inflammatory and highly prejudicial statements of Government counsel in his closing address (R. 51-54). Petitioner claims that the improper statements of Government counsel were provoked by the argumentative remarks of the defense attorneys in their summations regarding respondent's distinguished legal career.

Petitioner does not claim that the present case is in any manner "**extraordinary**" or of public importance. On the contrary, the petition for certiorari is practically limited to a discussion of the relative merits of the alleged defense of provocation. No specific reasons are given why a certiorari should be granted.

In the course of their argument of the merits, Government counsel suggest as a possible reason for the granting of a writ of certiorari that the Court of Appeals did not follow the applicable decisions of this Court in adjudging the

defense of provocation. In order to give this suggested reason a degree of importance that it does not possess and thus warrant the review on certiorari of an interlocutory judgment (i.e. a new trial), petitioner asserts in general terms but without substantiation that the Court of Appeals has laid down a new rule for testing the propriety of a prosecutor's actions that will severely hobble federal district attorneys in all criminal trials.

This Court has repeatedly declared that its power to issue certiorari to review interlocutory decrees and non-final judgments of the Courts of Appeals will be exercised only in "**extraordinary cases**"; and further that the fact that the judgment sought to be reviewed is not final may of itself alone furnish sufficient ground for the denial of the application. Leading cases in point are *Fields v. United States,* 205 U. S. 292 (1907) at page 296; *Hamilton Shoe Co. v. Wolf Bros.,* 240 U. S. 251 (1916) at page 258; *Forsyth v. Hammond,* 166 U. S. 506 (1897) at pages 513-15; *American Construction Co. v. Jacksonville, T. & K. W. Railway Co.,* 148 U. S. 372 (1893) at pages 383-84; and *Denver v. New York Trust Co.,* 229 U. S. 123 (1913) at page 133.

That the present case raises no question of gravity and importance, and that the Court of Appeals did not depart from the applicable decisions of this Court will convincingly appear from the opinion of Judge Maris (R. 51-54). The dissenting opinion by Judge Kalodner does not question the standards of propriety applied in the majority opinion (R. 54-55). The basis of the dissent is that the remarks of Government counsel were not *"so prejudicial as to constitute grounds for a new trial."*

Because the petition for certiorari is largely based on factual arguments that are controversial in nature and insinuate that the granting of a new trial contravenes the decision rendered by this Court in the earlier proceeding (No. 406, Oct. Term, 1948), this brief will consider these factual arguments in the order of their appearance in the petition and will show that the improper and highly preju-

dicial statements of Government counsel in his closing address cannot be justified or excused on the alleged ground of provocation.

II. The opening and closing statements of Government counsel to the jury that they were convinced of the guilt of the defendants were unprovoked and indefensible.

There can be no possible justification or defense for the opening and closing statements of Mr. Pratt in addressing the jury that Mr. Brooks and he, the two Special Assistants to the Attorney General specially assigned to try the present case, were convinced of the guilt of the defendants. These statements were in no wise provoked by defense counsel. The petition for certiorari studiously avoids any mention of these improper and prejudicial assertions.

At the very outset of his summation Mr. Pratt, Special Assistant to the Attorney General and trial counsel for the Government, asserted (R. 4):

> "We don't come in here with doubt in our minds; *we don't start unless we are convinced that we have a righteous cause to present.* We recognize our responsibility and we recognize our duty to the Government of the United States. . . ." (Emphasis supplied.)

His very last words to the jury were (R. 37):

> *"We are convinced that these defendants are all guilty of the offenses charged against them. . . ."* (Emphasis supplied.)

These improper and prejudicial assertions of personal conviction in the guilt of the accused were carefully calculated and timed to produce a wrongful conviction. They were certainly a foul blow which should never be resorted to by the prosecuting attorney and which this Court has

never permitted. Justice Sutherland in *Berger v. United States*, 295 U. S. 78 (1935) declared (p. 88):

> "The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; *and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.* As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt should not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, *while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction* as it is to use every legitimate means to bring about a just one.
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. *Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. . . .*" (Emphasis supplied.)

The zeal of Mr. Pratt for a conviction did not stop, however, with his opening and closing avowal of the belief of Mr. Brooks and himself in the guilt of the defendants. These avowals were an integral part of a deliberate and intemperate plan of Government counsel to give the present case an appearance of national importance by insisting that it involved the integrity of the Bar of Pennsylvania as well as of lawyers generally. As a consequence, respondent was deprived of his right to a fair trial.

The fact that Mr. Pratt was a Special Assistant to the Attorney General and not a local United States Attorney

makes his remarks even more reprehensible and damaging. Where, as here, the grand jury proceedings are conducted by special representatives and investigators of the Government from Washington, D. C., the indictment is returned at the instance of another Special Assistant to the Attorney General (former R. 15), and the trial is handled by a Special Assistant to the Attorney General, surely the prosecution must be aware of the greater significance and importance that arises in the minds of the jury from this active participation of the Attorney General through his special representatives, particularly since the local United States Attorney took no active part throughout the proceedings.

Moreover, a Special Assistant to the Attorney General ought to know that the controlling interest of the Government in a criminal prosecution is that justice shall be done and that he must refrain from improper methods calculated to produce an unfair trial and a wrongful conviction. He ought to know further that when he stressed the conviction of Mr. Brooks and himself (R. 4, 37) as the two Special Assistants to the Attorney General *"representing the Government in prosecuting this case"*, his statements would connote that they represented the personal views of the Attorney General. This misuse of the prestige and high authority of the Attorney General in order to gain a conviction should not be tolerated.

III. The granting of a new trial in no wise contravenes the prior opinion of this Court (336 U. S. 505).

The petition for certiorari repeatedly asserts that the Court of Appeals has again set aside the conviction of respondent that had been affirmed by this Court in *United States v. Knight*, 336 U. S. 505 (1949). By this assertion Government counsel seek to create the erroneous impression that the granting of a new trial was based upon the same alleged ground as the earlier reversal, i.e., the failure of the Government to prove the charges in the indictment.

But Judge Maris remanded the present case for a new trial (R. 53-54) solely upon the ground that the jury had been misled by the improper and prejudicial statements of Government counsel in addressing the jury which had prevented a fair trial.

When the present case was first before the Court of Appeals for the Third Circuit (former R. 836), Judge Maris in delivering the majority opinion directed the entry of a judgment of acquittal because the evidence did not support the charges made in the indictment. He specifically ruled that "**This conclusion makes it unnecessary for us to consider the other questions raised by the appellant**". After this Court had reversed the Court of Appeals upon the sole ground that there was substantial evidence to sustain the charges in the indictment (336 U. S. 505), the present case was remanded to the Court of Appeals in order that the latter might pass, inter alia, upon the question of a new trial that had been raised but not decided. In ordering a new trial, the Court of Appeals did not contravene or in any manner transgress the mandate of this Court.

In their petition for rehearing (R. 171-172) Government counsel urge that the granting of a new trial was largely influenced by the belief of the Court of Appeals that the Government's case against respondent was, if not actually "*weak*", at least "*not so strong*" as its case against the acquitted co-defendants, particularly Donald Johnson; that they considered the evidence against respondent to be "*overwhelming*"; and that the acquittal of Donald Johnson in no way detracted from the strength of the evidence against respondent. The same contention is repeated in the petition for certiorari (pp. 17-18), except that Government counsel has toned down its claim of "*overwhelming*" evidence to that of "*substantial*".

It is difficult to understand this contention because of the frank admission by Mr. Brooks that Government counsel believed the jury had acquitted those against whom the Government had the strongest evidence and convicted those

against whom the evidence was less strong (pp. 57-60; Tr. of First Oral Argument).

The sole issue decided by the Court of Appeals was whether or not the improper and inflammatory remarks of Mr. Pratt were so prejudicial as to require the granting of a new trial (R. 53-54). That Court found and concluded that Mr. Pratt's remarks had confused and misled the jury into considering respondent's alleged professional misconduct rather than his criminal guilt, namely, was respondent guilty of the offenses charged in the indictment (R. 54). Whether the Government had a strong or a weak case was not decisive of this finding and conclusion. What the Court of Appeals decided and condemned was that Mr. Pratt had centered his attack upon respondent personally and that that attack had been so dominated by passion and prejudice as to require a new trial.

It is not the function of a writ of certiorari either to evaluate the relative weight of the evidence or to speculate upon the possible reasons that may have motivated the jury in acquitting the arch-conspirator and the sole beneficiary (i.e. Donald Johnson). Government counsel should not be permitted to base their petition for certiorari upon these irrelevant issues.

IV. The reasons assigned in support of the defense of provocation are factually controversial and legally unsound.

The first and main contention of Government counsel (pp. 8-14 of petition) is that the inflammatory and highly prejudicial statements of Mr. Pratt in his closing address to the jury were provoked by the argumentative remarks of the defense attorneys in their summations regarding respondent's distinguished legal career and should therefore be condoned. This contention is factually and legally unsound because (a) Mr. Levy's summation is free of any provocative remarks, (b) respondent is not responsible for what other defense counsel may have said, (c) the state-

ments of Government counsel were so improper and so dominated by passion and prejudice as to preclude the defense of provocation, and (d) the Court of Appeals did not depart from accepted standards in adjudging the impropriety of the remarks of Government counsel.

Any discussion of the alleged defense of provocation would be incomplete without a brief reference to its eleventh hour origin. That defense was never raised by Government counsel until a new trial had been granted. When the improper and prejudicial statements of Mr. Pratt were first challenged, immediately after he had finished his closing address (R. 37-38), no attempt was made by Government counsel to justify or otherwise explain such statements. Apparently Mr. Pratt did not then believe that his statements were provoked. If he had, the normal and natural reaction would have been to plead provocation.

In the Government briefs before the Court of Appeals and this Court as well as in the oral arguments of Government counsel to both Courts there is no intimation whatever that the remarks of Mr. Pratt regarding respondent's professional conduct and legal career were provoked or invited or were responsive to any argument of Mr. Levy or other defense attorneys. The very first hint of the alleged defense of provocation is found in the motion for an order enlarging the time for filing a petition for rehearing and authorizing the record on appeal to be augmented (R. 55-58), in which motion Mr. Pratt wrongly attributed the alleged provocation to the address of Mr. Levy to the jury.

Following that motion Government counsel next absolved Mr. Levy from any impropriety and solely blamed the other three defense attorneys for inciting the improper and highly prejudicial remarks of Mr. Pratt (R. 64-65). Finally, in the petition for certiorari (pp. 10-11) Government counsel overlook their previous absolution of Mr. Levy from any provocative remarks and now argue that *"the summations of the four defense attorneys . . . justified government counsel in making the remarks in his summation which the majority below held to have been improper"*.

A. The summation by respondent's counsel, Mr. Levy, did not provoke the improper and prejudicial statements in Mr. Pratt's closing address to the jury.

Throughout the trial respondent was represented solely by Mr. Levy. Each of the four defendants had his own individual counsel to represent him and present testimony and examine or cross-examine witnesses on his behalf alone.

For example, after respondent had been examined by Mr. Levy on direct (former R. 389-494), he was then successively cross-examined by Mr. Pratt on behalf of the Government (former R. 495-551), by Mr. Margiotti on behalf of Donald Johnson (former R. 552-568), by Mr. Coughlin on behalf of Homer N. Davis (former R. 569-571), and by Mr. Robinson on behalf of George L. Fenner (former R. 572-573).

This practice of separate and successive examination of witnesses prevailed throughout the trial. Similarly, these four defense counsel made separate summations on behalf of their respective clients, in the course of which each specifically stated that he represented and was speaking only for his respective client (R. 67, 86, 122 & 132).

In recognition of the fact that the four defendants were separately defended by their own individual counsel, Government counsel limited their eleventh hour defense of provocation for the admittedly intemperate and inflammatory remarks of Mr. Pratt to the summation of Mr. Levy.

The Government in its first motion to enlarge the record on appeal complained only of the omission of Mr. Levy's summation. Paragraph 4 of that motion alleged that Mr. Pratt recalled that Mr. Levy in his summation had laid considerable stress upon respondent's distinguished career at the Bar and his high attainments in the legal profession, etc. Said motion suggests that if Mr. Levy's summation were made a part of the record on appeal so that Mr. Pratt's remarks could be appraised in the light thereof, the Court of Appeals might possibly desire to reconsider

its conclusion that the remarks of Mr. Pratt were unjustified, inflammatory and required a new trial.

By order dated January 31, 1950, the Court of Appeals directed, inter alia, that a transcript of Mr. Levy's summation be certified and transmitted as a supplement to the record on appeal. When received Government counsel immediately discovered that Mr. Pratt was mistaken in his recollection. This is not surprising because during the course of his summation Mr. Pratt had erroneously attributed to Mr. Levy certain cross-examination by Mr. Margiotti and had to be interrupted and corrected (former R. 760).

Thereupon the Government filed a second motion acknowledging Mr. Pratt's faulty recollection and stating that they had immediately ordered copies of the transcripts of the summations by the other three defense counsel, which latter summations furnished support for the argument they proposed to make in their petition for rehearing that Mr. Pratt's remarks were proper argument to the jury in the light *"of the defense attorneys' arguments"*.

Government counsel straddled the two contradictory positions taken in their preliminary motions by filing a petition for rehearing which bases the defense of provocation upon quoted excerpts from the four separate summations of defense counsel (R. 175-177). This straddling of Government counsel persists in the petition for certiorari. Both petitions fallaciously treat the four defense attorneys as if they were engaged in a single unified defense, in the presentation of which the separate counsel of each defendant was authorized to speak and was actually speaking equally for all four defendants. Obviously, there is no factual basis for this commingling of the four separate summations of the defense attorneys.

The petition for certiorari (pp. 10-11) by commingling selected excerpts from the four summations would infer that Mr. Levy actually injected into his argument to the jury *"the whole matter of respondent's distinguished career at*

the Bar, and particularly his position as 'an important officer of the American Bar Association' ". One will search in vain for any reference in Mr. Levy's summation to respondent's official position with the American Bar Association. His two brief references to respondent's reputation (R. 175) were solely to explain the grave responsibility he assumed in defending respondent, and to ask the jury not to make the fatal mistake of destroying the good reputation that respondent had built up during fifty-three years of the finest practice. The summation of Mr. Levy did not emphasize the legal reputation of respondent or the positions he had occupied in the organized Bar.

B. Respondent is not responsible for the statements of independent counsel representing the three other defendants.

There is no legal basis whatever for the novel contention of Government counsel that the separate and independent summations of Messrs. Margiotti, Coughlin and Robinson may be invoked to excuse the improper and highly inflammatory remarks of Mr. Pratt concerning the professional position and conduct of respondent. To permit such an innovation would destroy the trial procedure under which respondent was rightly permitted to be represented by counsel of his own choosing and to present only through that counsel his wholly separate defense. Such individual representation was imperative. A severance had been sought and denied. Unless each defendant was permitted to present his separate defense through his own counsel grave injustice would necessarily have resulted.

There is no reported federal case in which Government counsel have used or been allowed to use the separate and independent summation of counsel for one defendant to justify the intemperate and inflammatory remarks of Government counsel with respect to another defendant. In every case cited in the petition for certiorari the alleged

provocation was directly and solely attributable to the particular defendant complaining of the unfair and inflammatory remarks of the prosecutor.

A cursory review of the respective summations of Messrs. Margiotti, Coughlin and Robinson will suffice to show that the improper and prejudicial remarks of Mr. Pratt were not provoked by any argumentative remarks of these three defense attorneys in their summations regarding respondent's legal career, nor did said three summations afford any basis for Mr. Pratt's assertion that the present case involved the integrity of the Bar of Pennsylvania and lawyers in general.

Mr. Margiotti did not mention the offices held by respondent in the organized Bar. His sole reference to respondent's career was for the purpose of discrediting the improbable testimony of the self-confessed perjurer Michael that Knight had knowingly participated in a fraudulent diversion of trust funds. Mr. Margiotti pointed out that respondent was a leader of the Bar and that it was improbable that one who had led an honest and straight life for seventy-eight years would suddenly engage in a criminal offense (R. 177). The chief theme of Mr. Margiotti's summation was that the Government had failed to prove beyond a reasonable doubt that his client, Donald Johnson, had been a party to or benefited from the alleged conspiracy to embezzle funds of a bankrupt and transfer unlawfully accounts receivable belonging to the debtor's estate. Government counsel in the petition for certiorari (pp. 17-18) apparently agree with Mr. Margiotti's contention and now suggest that it best explains the acquittal of Donald Johnson.

Mr. Robinson mentioned in his summation (R. 175-176) the good reputation of respondent solely to explain why the Maxi Company replaced its counsel, George Fenner, when the reorganization of Central Forging became complicated legally, and to justify his client's (Fenner's) confidence in the judgment of respondent. Mr. Robinson's two

references to respondent's reputation and legal career were not for the purpose of convincing the jury of the lawfulness and propriety of respondent's actions, but were to justify his client's trust in respondent's decision. These references certainly did not provoke the mis-statements by Mr. Pratt regarding the greater duty of respondent ethically or his deliberate confounding of the issues to be determined by the jury.

The two references to respondent's legal career in the summation by Mr. Coughlin on behalf of his client, Homer N. Davis, (R. 176-177) were similar to Mr. Robinson's references both in nature and purpose. They explain why respondent had superseded Fenner in the reorganization proceedings and why respondent's testimony was more credible than that of Michael. They did not warrant Government counsel in centering their fire on respondent and over-emphasizing his alleged failure to live up to the high standards of his position as a leader of the Bar.

In passing it should be noted that Government counsel do not contend that the four summations of independent counsel for the defendants provoked or were in any manner responsible for the opening and closing statements of Mr. Pratt to the jury that Mr. Brooks and he were convinced of the guilt of the defendants.

C. The statements by Mr. Pratt were so improper and so dominated by passion and prejudice as to preclude the qualified defense of provocation.

Neither the Court of Appeals nor counsel for respondent have ever questioned the general proposition of law that remarks of counsel in addressing a jury which are otherwise improper may be overlooked if they were provoked by prior statements of opposing counsel in their summation. This brief has already demonstrated that the improper and prejudicial statements of Mr. Pratt were not provoked by what was said by Messrs. Levy, Margiotti, Coughlin and Robinson in their respective summations.

However, the defense of provocation is not an absolute defense. It will never prevail when, as here, it is shown that the remarks were so intemperate and inflammatory as to arouse the passion and prejudice of the jurors, thereby depriving the accused of a fair and impartial trial. In such a case the defense of provocation is overriden and a new trial is necessitated in the interests of justice, fairness and impartiality.

The opinion of Judge Maris (R. 53-54) is predicated upon the principle that the qualified defense of provocation can never justify the prosecuting attorney in confusing the issues involved and misleading the jury into considering an irrelevant issue in place of the offense charged in the indictment. Because the trial judge refused to correct the misstatement of Government counsel that the present case involved "**not only the integrity of the courts, but the integrity of the Bar of this State, the integrity of lawyers generally**" (R. 54), and also failed to make clear that the sole duty of the jury was to determine whether respondent was guilty of the offenses charged in the indictment, Judge Maris found and concluded that prejudice to the cause of respondent was so highly probable as to justify the granting of a new trial. In other words, if the jury has been so misled by the statements of Government counsel that the accused is denied a fair and impartial trial, the defense of provocation cannot be invoked as a bar to a new trial.

Government counsel have sought to minimize Mr. Pratt's attack upon respondent's professional position and conduct as minor aberrations in a prolonged trial rather than as cumulative evidence of a proceeding dominated by passion and prejudice. In their original brief on appeal (pp. 47-50) and again in the petition for rehearing (p. 2) it is claimed that the improper and highly prejudicial remarks of Mr. Pratt "*constitute a very small segment of a summation extending over sixty pages of the printed record* (former R. 728-786)" and do not "*so far overstep the*

bounds of propriety as to require reversal of the judgment of conviction". It should be noted that Government counsel have thus conceded the impropriety of Mr. Pratt's remarks and only question whether such impropriety was sufficiently prejudicial to warrant a new trial.

It is not accurate to describe the attack upon respondent's professional position and conduct as *"a very small segment"* of Mr. Pratt's summation. It featured and constituted a substantial part of his afternoon address to the jury. During his two hours of summation on Friday morning, November 9, 1949 (former R. 728-767), which portion constitutes in time and word space more than two-thirds of his address to the jury, Mr. Pratt did not attack respondent's professional position and conduct and did not indulge in intemperate and inflammatory remarks save and except for the unprovoked and highly prejudicial avowal at the very outset that Government counsel believed in the guilt of the accused (R. 4).

But an entirely different attitude characterized the afternoon address of Mr. Pratt. As noted in the opinion of Judge Maris (R. 53) **"counsel for the government seemed to center their fire on him (respondent) and to lay great emphasis upon his position as a lawyer and his failure to live up to the high standards of his position as a leader of the bar."**

Mr. Pratt opened his afternoon address with a bitter personal attack upon respondent's professional conduct during which he charged that respondent was under a greater ethical duty because he was and had been for years an important officer of the American Bar Association (R. 27). The opinion of Judge Maris points out (R. 54) that **"the appellant's duty to obey the provisions of the Bankruptcy Act therein charged to have been violated was no greater than that of his co-defendants, and that they, the jury, were not charged with determining by their verdict whether the appellant had been guilty of professional misconduct."**

This attack was followed by seven more (R. 27, 28, 28-29, 36, 36-37) that likewise censured respondent both as an individual lawyer and as a member of the organized Bar. Portions of these attacks are quoted verbatim in the opinion of Judge Maris (R. 53-54). These attacks stressed the importance of the present case upon the alleged ground that *"Involved here is not only the integrity of the courts, but the integrity of the Bar of this State, the integrity of lawyers generally. That protection we are entitled to hear from your lips, a condemnation of what the unscrupulous lawyer will do"* (R. 54).

These eight successive attacks dominate the closing remarks of Government counsel. In time and word space they constitute a very considerable portion of Mr. Pratt's afternoon address. Even more important, however, is the fact that they were deliberately and artfully withheld until the closing portion of Mr. Pratt's summation. He rightly calculated that the jury would thus be misled into believing that respondent's alleged professional misconduct was at issue and determinative of the latter's guilt or innocence.

These concentrated and carefully timed attacks disclose a predominant purpose and design to charge respondent with gross professional misconduct as an effective means of securing his conviction. They are not minor aberrations in a prolonged trial. Judge Maris correctly concluded **"There is strong indication that the jury was misled by these mis-statements of government counsel into considering the appellant's professional misconduct instead of his criminal guilt"** (R. 54). These attacks evidence such passion and prejudice on the part of Government counsel as to warrant a new and impartial trial. Under the authority of *Berger v. United States*, 295 U. S. 78 (1935) at page 89, Judge Maris ruled **"prejudice to the cause of accused is so highly probable that we are not justified in assuming its non-existence"** (R. 54).

At both oral arguments before the Court of Appeals, Government counsel were forced to concede that the instant indictment grew out of a grand jury investigation which lasted many months, had no motive other than to examine into the conduct of Judge Albert W. Johnson, and eventuated in his indictment and that of three of his sons for the alleged sale of justice. Despite this background and the admission by Government counsel that they regarded the accused Donald Johnson as the moving spirit and sole beneficiary of the conspiracy charged, Mr. Pratt nevertheless centered his attack upon respondent and overplayed his alleged failure to live up to the high ethical standards of his position as a leader of the Bar and an officer of the American Bar Association. It certainly was not fair advocacy to attack respondent for his professional leadership and activities and to misrepresent to the jury that the integrity of the Pennsylvania Bar and lawyers in general was entrusted to their protection.

The high probability and the strong indication that Mr. Pratt's intemperate and inflammatory remarks prejudiced the cause of respondent is convincingly evidenced by the acquittal of two of the defendants—Donald Johnson, the arch conspirator and sole beneficiary, and Homer N. Davis, the corporate treasurer, who actually made the payment—and the conviction of respondent and Fenner, the other two defendants who neither benefited from nor made the payment and who acted solely in an advisory capacity. Such a capricious verdict can only be explained by the passion and prejudice wrongfully aroused in the jury by the improper and inflammatory summation of Mr. Pratt.

D. The Court of Appeals applied accepted standards in testing the impropriety and highly prejudicial nature of the statements of Mr. Pratt in his summation.

The petition for certiorari (pp. 11-13) cites by name many decisions by this Court and the several Courts of

Appeals for the principle that the propriety of the prosecutor's summation must be judged in the light of the summations of defense counsel, and that proper responsive remarks do not constitute reversible error. Counsel for respondent have no quarrel with this general principle of law but assert that it has no application to the present case because the improper and highly prejudicial remarks of Mr. Pratt were neither responsive nor proper.

In none of the cases cited by Government counsel was an attempt made to justify the improper remarks of the prosecutor about one defendant by invoking the separate and independent summation of counsel for another defendant. In every case cited the alleged provocation was founded upon remarks by counsel for the defendant against whom the proper retaliatory remarks of Government counsel were directed.

Moreover, no case cited by Government counsel in the petition for certiorari overrules or qualifies the fundamental principle declared by Justice Sutherland in *Berger v. United States*, 295 U. S. 78 (1935) that where passion and prejudice have so poisoned the minds of jurors that it is highly probable that the accused may have been deprived of a fair and impartial trial, a new trial is mandatory in order that the ends of justice may be served. Judge Maris based his opinion upon the *Berger* case, declaring that it was the duty of the prosecutor to refrain from improper methods calculated to produce a wrongful conviction. He pointed out how the jury had been misled by Mr. Pratt into considering respondent's alleged professional misconduct instead of his criminal guilt. From that misleading of the jury, he concluded that the circumstances of the present case strongly indicated that the cause of respondent had been thereby prejudiced (R. 53-54).

In addition to the *Berger* case, *supra*, this Court, speaking through Chief Justice Stone in the case of *New York Central R. R. v. Johnson*, 279 U. S. 310 (1929), reversed a

judgment for damages solely because counsel had bitterly and passionately attacked his opponent (pp. 317-319):

> "• • • Their obvious purpose and effect were improperly to influence the verdict by their appeal to passion and prejudice.
>
> "However ill advised, counsel for petitioner was within his rights in following this line of inquiry, and even if it be assumed that the situation was one calling for comment on the evidence so elicited, neither petitioner nor its counsel was on trial for pursuing it. *Want of good judgment or good taste, or even misconduct on the part of either, was not an issue in the case for the jury, nor could it excuse like conduct on the part of respondents' counsel.* See Tucker v. Henniker, 41 N. H. 317, 322; Mittleman v. Bartikowsky, 283 Pa. 485, 488; Mitchem v. Georgia, 11 Ga. 615, 629; Welch v. Union Central Life Ins. Co., 117 Iowa 394, 404. An exhibition of any or all of these faults was not ground for a verdict in respondents' favor or for enhancing it.
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> "• • • The occasion seems appropriate to remind counsel that *the attempted presentation of cases* without adequate preparation and *with want of fairness and candor discredits the bar and obstructs the administration of justice.*" (Emphasis supplied.)

That a federal court upon its own motion may order a new trial whenever it finds that the jurors did not appraise the evidence objectively and dispassionately because of inflammatory remarks of counsel was affirmed by Judge McLaughlin in the recent case of *Marron v. Atlantic Refining Co.*, 176 F. (2d) 313 (1949) (C. C. A. 3), wherein it is stated (p. 316):

> "• • • Nevertheless, because the defense statement was unwarranted, we have gone into it carefully and as we pointed out above we do not find it to have

been of any substantial importance. We find no sound reason for thinking that the minds of the jurors would be so influenced by such incidental statement '• • • that they would not appraise the evidence objectively and dispassionately'. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 230, 60 S. Ct. 811, 852, 84 L. Ed. 1129. As Mr. Justice Douglas said in that case, 310 U. S. at page 240, 60 S. Ct. at page 852: '*Of course, appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial.* But each case necessarily turns on its own facts.' . . ." (Emphasis supplied.)

The general rule that a verdict resulting from passion and prejudice aroused by the extreme argument of counsel will not be permitted to stand was also applied in the case of *Metropolitan Life Ins. Co. v. Banion,* 106 F. (2d) 561 (1939) (C. C. A. 10) at page 568, and *United States v. Runner,* 174 F. (2d) 651 (1949) (C. C. A. 10) at page 653. That it is highly improper for the prosecutor to accuse a lawyer-defendant of professional misconduct when the charge in the indictment is an alleged fraud against the United States or its laws was ruled by Circuit Judge Sanborn in *Myres v. United States,* 174 F. (2d) 329 (1949) (C. C. A. 8). He stated (pp. 338-39):

"The defendant also complains of certain remarks made by government counsel in argument to the jury. The Assistant United States Attorney, in the midst of his opening argument, in referring to a $17,500 settlement made by the defendant shortly before Mr. Sizer's death, the proceeds of which were not deposited in the bank, said: 'I have an analysis here and I am going to tell you where the cash went. I am going to show you that the defendant was cheating his dying partner.' The District Court sustained an objection to that statement and instructed the jury to disregard it. The

statement of counsel should not have been made. *The defendant was not charged with cheating his partner, but with having deliberately attempted to cheat the United States. The prompt action of the District Court prevented the improper argument from ripening into prejudicial erorr.*" (Emphasis supplied.)

The petition for certiorari (p. 14) asserts that the Court of Appeals in granting a new trial "*has plainly disregarded these tests by which a prosecutor's actions must be judged, and has laid down a new rule severely hobbling federal district attorneys. Its decision is of serious consequence not only to respondent's case but in all federal criminal trials.*" This assertion is without foundation of fact or law.

Convincing proof that the Court of Appeals was well aware of and applied the rule that improper remarks of Government counsel should be judged in the light of the preceding summation of defense counsel and might be excused if properly responsive is afforded by the action of that Court after it had granted a new trial. As a preliminary step to filing its petition for a rehearing the Government moved the Court to authorize the augmentation of the record by directing the trial reporter to transcribe, certify and transmit Mr. Levy's summation so that that Court might be able to appraise Mr. Pratt's remarks in the light of Mr. Levy's when reconsidering its conclusions that the former's were so unjustifiably inflammatory as to require a new trial (R. 55-58).

This untimely motion was made to correct the failure of Government counsel to move the trial court to have Mr. Levy's summation transcribed and made a part of the record on appeal. No excuse has ever been offered by the Government to explain why this motion had not been made at the trial, as required by rule of court. Despite the unexplained delay of Government counsel the Court of Ap-

peals granted the motion and made Mr. Levy's summation a part of the record.

When Government counsel discovered that Mr. Levy's summation contained no provocative remarks, they filed a further motion (R. 64-66) requesting that the summations of Messrs. Margiotti, Coughlin and Robinson be transcribed, certified and also made a part of the record on appeal. Again the Court of Appeals overlooked the delay of Government counsel and permitted them to engage in a fishing expedition in an effort to find some provocation in the respective summations of these three separate and independent defense attorneys.

Having thus augmented the record on appeal, Government counsel filed their petition for rehearing (R. 159-178) in which for the first time they pleaded the defense of provocation. Theretofore they had always contended that the remarks of Mr. Pratt were proper and constituted at worst minor aberrations in a prolonged trial that had not been dominated by passion and prejudice.

Counsel for respondent filed a brief in opposition to the petition of Government counsel for rehearing, in which brief they argued that the improper and highly prejudicial remarks of Mr. Pratt had not been provoked by the respective summations of defense counsel, and that the Court of Appeals had properly granted a new trial because the jury had been misled by Mr. Pratt and further because respondent's cause had thereby been prejudiced (R. 183-202).

It thus appears that the Court of Appeals had before it the several arguments, pro and con, upon the alleged defense of provocation. The fact that a rehearing was denied without opinion is striking proof that the Court of Appeals still believed that the improper remarks of Mr. Pratt were not provoked and had misled the jury with a consequent denial of respondent's right to a fair and impartial trial. The further fact that such denial was without a dissent indicates unanimity respecting the absence of provocation.

V. The trial judge refused and failed to correct the improper and highly prejudicial remarks in the summation of Mr. Pratt.

The petition for certiorari (pp. 14-16) blames respondent and his counsel for not requesting the trial judge to supplement his charge with an appropriate specific instruction correcting any misleading of the jury by Government counsel regarding the offense with which respondent was charged under the indictment. Government counsel are bold enough to assert that had such a request been made the trial judge would undoubtedly have granted it.

This contention of Government counsel wholly disregards the summary action of the trial judge immediately after the conclusion of Mr. Pratt's summation. Counsel for respondent immediately moved for the withdrawal of a juror (R. 37-38) because of the intemperate remarks in Mr. Pratt's summation about (1) the belief of Government counsel in the guilt of the defendants, (2) the higher duties of respondent as a lawyer, and (3) his membership in the American Bar Association. In denying the motion the trial judge stated (R. 38):

> *"The Court: The motion is denied. You may have an exception to it."* (Emphasis supplied.)

That categorical and final ruling of the trial judge clearly indicated that he had no intention whatever of going further and correcting the remarks of Mr. Pratt when he charged the jury. Under such circumstances it is evident that respondent's counsel had fully performed his duties with respect to this prejudicial error and was under no obligation whatever to press the matter further.

It is of special significance that the trial judge at the end of his charge (R. 48-49) adverted to the objections of defense counsel to certain remarks of Mr. Pratt during his closing address to the jury, but wrongly stated the grounds of these objections i.e., that the remarks did not conform to

the evidence. These were not the grounds upon which respondent's counsel asked for the withdrawal of a juror. Had the trial judge intended to correct the intemperate and inflammatory remarks of Mr. Pratt regarding the professional life of respondent, here was his opportunity to do so. Evidently he regarded this objection as a closed incident and dismissed the objections of defense counsel by instructing the jury to disregard any remarks by Government or defense counsel that did not conform to the evidence.

It thus appears that the criticism of respondent's counsel for not asking the trial judge to supplement his charge with an appropriate specific instruction and the conjecture of Government counsel that the trial judge would have corrected any misapprehension on the part of the jury regarding the offense with which respondent was charged are wholly unjustified and contrary to the record evidence.

The important fact that must never be overlooked is that the jury were not instructed to disregard the accusations of Government counsel that respondent was guilty of professional misconduct and to consider and determine whether or not he was guilty of the offenses charged in the indictment. Furthermore, the trial judge clearly indicated by refusing to withdraw a juror and by granting an exception thereto that he had finally disposed of the objections of respondent's counsel to the intemperate and inflammatory remarks of Mr. Pratt concerning respondent's professional life and conduct, and that he did not intend to take or permit any further steps to correct those remarks.

The petition for certiorari (pp. 16-17) argued that *"There was no real danger of the jury's being misled into considering respondent's professional misconduct, rather than his guilt under the indictment, in returning their verdict."* This unsound argument has already been fully considered and answered (pp. 14-17 ante). Perhaps the best proof of this is the acquittal by the jury of two of the defendants, Donald Johnson and Homer N. Davis, and the conviction of the other two defendants, respondent and

Fenner, which verdict the Government has never been able to explain.

VI. The granting of a new trial was not predicated upon the relative strength or weakness of the Government's case against respondent.

The petition for certiorari (pp. 17-18) claims that the granting of a new trial was based *"at least in part . . . on the majority's belief that the Government's case against respondent was less strong than its case against his acquitted codefendants, particularly Donald Johnson."* This claim has been previously considered and answered (pp. 6-7 ante).

Having found and concluded that Mr. Pratt's remarks had confused and misled the jury into erroneously considering respondent's professional misconduct instead of his criminal guilt (R. 54), and that this misleading of the jury was so highly prejudicial that a new trial had to be granted in order to protect respondent's right to a fair and impartial trial, the question whether the Government's case against respondent was strong or weak becomes irrelevant and of no controlling importance. The basis of the opinion by Judge Maris was that Government counsel had misled the jury and improperly appealed to their passion and prejudice in order to obtain a conviction, and that such a course of action was so highly prejudicial as to warrant a new trial.

VII. Respondent's right to a fair and impartial trial may not be defeated by the alleged heavy cost of a retrial.

The petition for certiorari (p. 18) alleges that the Government should not have to undergo the heavy burden and cost of a new trial, particularly since the original trial consumed nearly four full weeks and the present case was an unusually complicated one. This allegation is unsound in law and comes with poor grace from Government counsel.

The paramount duty of the Government in every criminal prosecution is to see that justice is done. Where, as here, the improper and highly prejudicial remarks of the prosecution have misled the jury and an injustice has been done, the granting of a new trial is obligatory regardless of expense.

Had Government counsel curbed their over-zeal and refrained from improper and inflammatory methods calculated to produce a wrongful conviction, an expensive retrial would not have been necessary. The present case affords cogent proof that Government counsel need to be reminded that justice and not conviction by any means should and must be their guiding principle and duty.

VIII. Conclusion.

It is respectfully submitted that the petition for certiorari should be denied because

(1) No "*extraordinary*" reason is assigned for the review by this Court of the non-final order of the Court of Appeals in granting a new trial;

(2) The decision of the Court of Appeals is not in conflict with the decisions of this Court or of any other Court of Appeals;

(3) The improper and inflammatory remarks of Government counsel were not provoked.

(4) The jury were patently misled by the improper and highly prejudicial remarks of Government counsel; and

(5) Respondent was denied a fair and impartial trial.

Respectfully submitted,

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